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CHARLES ELMORE CR

No. 217

In The

Supreme Court of the United States

October Term, 1932.

Guaranty Trust Company, Executor, Etc.,
Appellant,

vs.

William H. Blodgett, Tax Commissioner,
Appellee.

Appeal from the Superior Court of Fairfield County, Connecticut.

PETITION FOR REHEARING.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

GUARANTY TRUST COMPANY, EXECUTOR, ETC.,
Appellant,

VS.

WILLIAM H. BLODGETT, TAX COMMISSIONER,
Appellee.

APPEAL FROM THE SUPERIOR COURT OF FAIRFIELD COUNTY, CONNECTICUT.

PETITION FOR REHEARING.

The appellant, Guaranty Trust Company of New York, petitions this Honorable Court for a rehearing in the above entitled cause, for the reason that the decision of the Court, rendered on January 9th last,* was based on a ground which had not been argued before the Court and which appellant, having relied on the previous decisions of this Court, reasonably assumed did not require argument.

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* The time for filing this petition was extended to February 18th, 1933, by Mr. Justice Stone, under Rule 33 of the Rules of this Court.

Major Premise Of Appellant's Argument.

In its argument before this Court, appellant assumed as its major premise that a TRANSFER THROUGH AN IRREVOCABLE TRUST, NOT MADE IN CONTEMPLATION OF DEATH, IS NOT TESTAMENTARY IN EFFECT, in other words, that the generating source of such transfer is not the death of the donor, but the deed of trust.

In support of this premise, appellant throughout its briefs relied on the decisions of this Court in *Coolidge v. Long,* 282 U. S. 582 and other cases. In his oral argument, counsel for appellant expressly stated with reference to this proposition: "I assume that it is not necessary to reargue the case of *Coolidge v. Long* or the cases which preceded it."

Reasons In Support Of The Petition For Rehearing.

In support of this petition for rehearing, appellant submits:—

(1) That the basis of the decision in this case under the 14th Amendment, namely, that "the tax was imposed upon an event generated by the death of the decedent", is not compatible with the decisions of this Court in *Coolidge v. Long* and the cases which preceded it.

(2) That the time of the passage of the taxing statute does not determine whether the event taxed takes its source in the death of the decedent or in the deed of trust transferring the property.

(3) That the retroactive application of the Massachusetts Inheritance Tax Statute in *Coolidge v. Long* was not the sole determining factor in holding that tax unconstitutional, and that if it were, the decision would have been inconsistent with prior decisions of this Court.

(4) That the question presented is far too important to be disposed of on the authority of a statement in a prior decision which is mere *dictum* and which is in conflict with the *ratio decidendi* of the same case. This Court, it is true, is not bound by its prior decisions, but when it finds it necessary to depart from its former views, the principles of certainty and stability in the law, as well as justice to the litigants, require that the Court state its reasons for reversing the former decision or for distinguishing the case at bar from those previously decided.

I.

The Decision Rendered On January 9th Is Incompatible With The Law As Established In Coolidge v. Long And Previous Cases.

That the basis of the decision in the present case is not compatible with *Coolidge v. Long, supra,* can best be illustrated by a tabular comparison between those elements in the two cases which have a bearing on the generating source of the event taxed. It will readily appear that although the elements or factors are the same, the conclusions reached are contrary. Both of them cannot be right.

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The Transfer.[1]	
Irrevocable trust reserving a life interest in the donor with remainders to others.	The same.

[1] Appellee apparently sought to establish a distinction between an irrevocable trust like that found in *Shukert v. Allen*, 273 U. S. 546 or *Reinecke v. Northern Trust Co.*, 278 U. S. 339 and one in which the settlor reserved a life interest. See also opinion of the court below which raises an absolute presumption of intent to have the transfer take effect in possession or enjoyment at death, where there is a reservation of a life interest (R. 27). Such distinction cannot be made in view of the fact that in *Coolidge v. Long* there was a reservation of a life interest. See also *Reinecke v. Northern Trust Co.*, supra, p. 347-8.

The Statute.[2]

"All property and any interest therein owned by a resident of this state at the time of his decease, * * * and all gifts of such property by deed, grant or other conveyance, * * * intended to take effect in possession or enjoyment at or after the death of such grantor or donor, shall be subject to the tax herein prescribed." (Interpreted to include transfers of property not owned at time of death, thus making the two statutes equivalent.)

"All property within the jurisdiction of the Commonwealth * * * which shall pass by * * * deed, grant or gift, made or intended to take effect in possession or enjoyment after his death * * * to any person, absolutely or in trust * * * shall be subject to the tax."

Nature of Tax as Interpreted by State Court.[3]

Tax imposed not on succession to the property upon death, but upon privilege of succeeding to the possession or enjoyment.

The same.

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[2] For the purpose of this argument we accept as reasonable the supposed interpretation of the statute by the court below that the legislature intended to tax property beyond the interest of the decedent at the time of her death. With such an interpretation the two statutes are equivalent in the classes of transfers taxed.

[3] Compare (R. 27) with the statement of the Supreme Judicial Court of Massachusetts, 268 Mass. 443, 447, 448, 449.

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Date of Succession to Possession or Enjoyment, as Distinguished From Date of Right to Succeed to Possession or Enjoyment.[4]

After the taxing statute.	The same.

Operation and Effect of the Tax as Interpreted By This Court.[5]

No interpretation as to operation and effect of the tax.	Tax imposed not merely on the succession to the possession or enjoyment, but on the *right* to succeed to the possession or enjoyment (quoting from Houston's Estate, 276 Pa. 330).

Generating Source of Transfer of Right to Possession or Enjoyment.[6]

"In that view the tax was imposed upon *an event generated by the death of the decedent.*"	*"Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right in the remaindermen."*

[4] In the instant case, the statute was enacted in 1923; the payments of income to the husband began in 1930; the principal has not yet been turned over to the decedent's daughter. In the Coolidge case, the latest amendment to the 1907 Act was enacted in 1921; the property came into the hands of the beneficiaries in 1925.

[5] While a state may impose a tax on the privilege of succeeding to the possession or enjoyment of property, such a tax cannot be imposed apart from one on whatever rights the beneficiary may already have in the property. If, therefore, the beneficiary's rights to the property have been vested in him by a deed of trust or by any other conveyance, a tax on the privilege of the succession to the possession or enjoyment is a tax on his property rights. This proposition is so evident that it requires no demonstration.

[6] The inconsistency of the two conclusions as to the generating sources of the transfers is evident.

NATURE OF THE TAX DOES NOT DETERMINE GENERATING SOURCE OF EVENT TAXED.

The phrase *"In that view"*, beginning the last paragraph of the Court's opinion (rendered January 9th), relates to the nature of the tax, or the taxing statute, as interpreted by the state court.

But we have shown in our main brief (pages 15-17), that the nature of the tax does not determine the nature of the transfer or event sought to be taxed. The two cases of *Nichols v. Coolidge*, 274 U. S. 531 and *Coolidge v. Long*, supra, which involved the identical facts, amply illustrate this proposition. In *Chase National Bank v. United States*, 278 U. S. 327, the petitioner sought to establish a distinction in reference to this question between estate and succession taxes, arguing that while a succession tax might be imposed, an estate tax could not be, just as the appellee here argued that while an estate tax might not be applicable, a succession tax was. After comparing the case with *Saltonstall v. Saltonstall*, 276 U. S. 260, Mr. Justice STONE came to the conclusion (p. 336):

> "But we think that the rule applied * * * to a succession tax is equally applicable to a transfer tax where, as here, the power of disposition is reserved exclusively to the transferror for his own benefit."

So we have the same rule applied in two cases of irrevocable trusts and two cases of revocable transfers, each pair involving an estate tax and a succession tax. And it will be noted that in the two succession tax cases, the interpretation of the state court was identical with that of the court below in the case at bar.

COOLIDGE V. LONG IS SUPPORTED BY A LONG LINE OF DECISIONS.

The conclusion reached in *Coolidge v. Long* is the same as that reached by this Court in a large number of preceding cases.

The following are the cases in which this Court has held that a transfer by an irrevocable trust operated to transfer the property rights by deed, and that the generating source of the transfer was not the death of the donor.

1. In *Shukert v. Allen,* 273 U. S. 546, the settlor transferred property in trust to accumulate the income for some 30 years and then to divide the principal and undistributed income to his children. The question raised and answer given can best be quoted. Mr. Justice HOLMES said (p. 547):

> "The only question is whether the trust was one intended to take effect in possession or enjoyment after his death, as was ruled below.
>
> The transfer was immediate and out and out, leaving no interest remaining in the testator. * * * the interest of the children respectively was vested as soon as the instrument was executed, * * *".

2. In *Nichols v. Coolidge,* 274 U. S. 531, the facts of which are well known to this Court, Mr. Justice MCREYNOLDS, answering the Government's argument that the imposition of the tax constituted an exercise of the Federal taxing power upon a transmission of property by death, said (p. 540):

> "But the conveyance by Mrs. Coolidge to trustees was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death."

3. In *Reinecke v. Northern Trust Co.*, 278 U. S. 339, there were five trusts in each of which there was a provision that the trust was to terminate five years after the settlor's death or on the death of the respective life tenant, whichever should occur first, and the settlor reserved the right to revoke each of these five trusts with the consent of the respective life tenants. This Court held that no estate tax could be imposed, because the property had passed out of the donor's control, as if the gifts had been absolute. In answer to the argument that the trusts were still subject to revocation by the settlor, though with the consent of the beneficiary, Mr. Justice STONE, delivering the opinion of the Court, said (pp. 346-347):

> "He could not effect any change in the beneficial interest in the trust without the consent, in the case of four of the trusts, of the person entitled to that interest, and in the case of one trust without the consent of a majority of those so entitled. Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute."

There is a limitation on the proposition that a provision in a trust instrument reserving the right to revoke only with the consent of another renders the trust irrevocable. That limitation is to be found in the case of *Saltonstall v. Saltonstall*, 276 U. S. 260, which will be discussed presently.

4. In *May v. Heiner*, 281 U. S. 238, Mr. Justice McREYNOLDS said with reference to the transfer of property in that case (p. 243):

> "At the death of Mrs. May no interest in the property held under the trust deed passed from her to

> the living; title thereto had been definitely fixed by the trust deed."

5. The same result, as has been shown, was reached in the case of *Coolidge v. Long*, 282 U. S. 582, where a succession tax was involved. In discussing the operation and effect of the transfer, Mr. Justice BUTLER said (p. 597-8):

> "Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right in the remaindermen. * * * Nothing moved from her or him or from the estates of either when she or he died. There was no transmission then. The rights of the remaindermen, including possession or enjoyment upon the determination of the trusts, were derived solely from the deeds. The situation would have been precisely the same if the possibility of divestment had been made to cease upon the death of a third person instead of upon the death of the survivor of the settlor. The succession, when the time came, did not depend upon any permission or grant of the Commonwealth."

Mr. Justice BUTLER further said (p. 598):

> "Succession is effected as completely by a transfer of a life estate to one and remainder over to another as by a transfer in fee."

On the other hand, in the cases in which the conclusion reached was that the death of the grantor was the generating source of the transfer, the trusts were held to be revocable in character and therefore the tax applicable.

The case of *Saltonstall v. Saltonstall*, 276 U. S. 260, involved substantially the same facts as *Reinecke v. Northern Trust Co.*, supra, except that the transferror re-

served the right to alter the trust with the concurrence of one of the trustees, rather than one of the beneficiaries. With reference to the question whether the property vested in the beneficiaries by the deed of trust, or whether it remained in the control of the donor, Mr. Justice STONE said (p. 271):

> "The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another. And so the property passing to the beneficiaries here, was acquired only because of default in the exercise of the power during the donor's life and thus was on his death subject to the state's power to tax as an inheritance."

The reason for the decision in *Saltonstall v. Saltonstall* was further clarified in *Chase National Bank v. United States,* 278 U. S. 327, where the controversy related not to a trust, but to policies of life insurance taxable under Sec. 401 of the Revenue Act of 1921. The Court held that the policies were taxable because the *power* or *control* retained by the decedent over the policies, such as the right to surrender and cancel them, to pledge them as security, etc., clearly indicated that the benefit did not accrue to the beneficiaries or leave the decedent before his death.

In the recent case of *Commissioner of Internal Revenue v. Guggenheim,* decided February 6th, Mr. Justice CARDOZO characterized the termination of the power of revocation in the trusts there involved as follows: "They acquired substance and reality for the first time in July, 1925, *when the deeds became absolute* through the cancellation of the power. (Italics supplied). On the other hand, while the trusts were revocable, he said, "the gifts, from the point of view of substance, were inchoate and

imperfect. By concession there would have been no gift in any aspect if the donor had attempted to attain the same result by the mere delivery of the securities into the hands of the donees. A power of revocation accompanying delivery would have made the gift a nullity."

These cases illustrate the following propositions:

(1) The test for determining whether a trust is revocable or irrevocable is whether the donor retains control of the property up to the time of his death.

(a) If the control or power to revoke depends upon the settlor alone, or upon him and any other person but the beneficiary, the trust is revocable.

(b) If the donor retains no power or control over the property, or if the power to revoke depends upon the beneficiary, then the trust is irrevocable.

(2) A revocable trust is a transfer which for purposes of imposing death duties has its generating source in the death of the grantor.

(3) An irrevocable trust is a transfer which takes its source in the deed transferring the property.

In the present case, when Mrs. Sewell transferred her property in trust in 1926, she parted entirely with the right to revoke or alter the trust. It was an irrevocable trust, and the generating source of the transfer was not her death, but the deed of trust.

II.

The Effective Date Of The Taxing Statute Has No Relation To The Generating Source Of The Event Taxed.

The only difference between the present case and *Coolidge v. Long* is the effective date of the taxing statute in relation to the deed of trust. But the time of the passage of the taxing statute has no bearing on the question whether in a given case the transfer of property rights takes its source in the deed of trust or in the death of the donor. This proposition is self evident. Whether the instrument of transfer is a deed absolute, whether it is made in contemplation of death, whether the transfer is by a trust revocable or irrevocable, whether the transferror retains control over the property or abandons control entirely—these are the factors which determine the source of the transfer of property rights, irrespective of whether death duties are or are not imposed,[7] and if they are, irrespective of whether they are imposed before or after the execution of the instrument of transfer. In *Nichols v. Coolidge*, supra, and *Coolidge v. Long*, supra, where the transfers were made prior to the effective dates of the taxing statutes, death was held to be not the generating source of the transfers. But so it was also held in *Shukert v. Allen*, supra, *Reinecke v. Northern Trust Company*, supra, and *May v. Heiner*, supra, where the instruments of transfer were executed after the dates of the respective taxing statutes. In the cases of the revocable trusts, it was held that death was the generating source, whether created before the effective date of the act, as in *Saltonstall v. Saltonstall*, supra, or after the date of the enactment, as in the case of *Chase National Bank v. United States*, supra.

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[7] See *Commissioner of Internal Revenue v. Guggenheim*, supra. We assume that the result reached would have been the same, had there been no estate tax at all, but only a gift tax.

III.

The Retroactive Application Of The Taxing Statute In Coolidge v. Long Cannot Be Taken As The Sole Determining Factor In Holding The Tax Unconstitutional.

This brings us to the question whether under any circumstances it can be said that the retroactive application of the statute in *Coolidge v. Long* was *the* determining factor in holding that the tax was unconstitutional, and whether the case at bar can be distinguished from *Coolidge v. Long* on that ground.

If the death of the donor were the generating source of the transfer in *Coolidge v. Long,* then the tax should have been held applicable, as it was held in *Saltonstall v. Saltonstall.* In the latter case, the settlor created a deed of trust between 1905 and 1907, and the trust instrument provided that its terms might be changed and the trust terminated in whole or in part by the settlor with the concurrence of one of the trustees. The question before this Court was whether the Massachusetts statute, as applied, deprived the beneficiaries of their property without due process of law, because it was retroactive as to them. The beneficiaries claimed under the trust made before 1907, when the first inheritance tax statute was passed, and this Court therefore found it necessary to determine whether the property rights vested in them prior to the effective date of that act. Having determined that those rights had not vested prior to the first inheritance tax statute, because the trust was revocable, the Court concluded that the tax was not retroactively applied. In other words, *the test of retroactivity in such cases is not whether the deed was executed before the passage of the Act, but whether the death occurred prior to the passage of the Act.*

The reason for taking the date of the transfer as the determining date for the retroactivity of the taxing statute in *Coolidge v. Long* was that the rights had vested under the deed of trust, and the death was not the generating source of the transfer. But then, even without a retroactive statute, a death duty so imposed would nevertheless be without due process under the decisions of this Court in *Schlesinger v. Wisconsin*, 270 U. S. 230 and *Heiner v. Donnan*, 285 U. S. 312, namely, that *death duties cannot be imposed on transfers which are not testamentary or testamentary in effect.*

We gave thorough consideration to the *dictum* in *Coolidge v. Long*, concerning the possible results if there were no retroactive applications of the statute, when we answered the appellee's motion to affirm. In that answer (p. 4-5) we pointed out that the second sentence of the *dictum* must be read in conjunction with the first sentence for an explanation of the qualifying terms "such an excise" and "so passing". Justice BUTLER's *dictum* in *Coolidge v. Long* (p. 596) reads as follows:

> "In its opinion, the state court suggests that the federal estate tax was upon property of the deceased transferred at his death and that it was levied upon a subject 'quite different from the succession to property by a beneficiary, which is the subject of the present excise'. Undoubtedly the state has power to lay such an excise upon property so passing after the taking effect of the taxing Act".

We interpreted that statement to mean that the state could impose a prospective tax similar to the federal estate tax, subject, of course, to whatever other constitutional limitations there may be on the estate tax. One of those limitations is that the tax must be imposed on an event the generating source of which is the death of the transferror.

The construction of that *dictum*, embodied in the opinion of this Court, rendered January 9th, deprives the decision of *Coolidge v. Long* of its reasonable basis. If the tax in the case at bar is held to be a tax on succession to the possession or enjoyment of the property, and within the Constitution because not retroactively applied, it must be also noted that the tax on the succession to the possession or enjoyment of the property in *Coolidge v. Long* was also not retroactively applied. That succession took place in 1925, and the Massachusetts tax was imposed in 1921.

This was pointed out in the dissenting opinion of Mr. Justice ROBERTS, but the argument was not accepted by the Court, because the tax *in its operation and effect* was not on the mere succession to the possession or enjoyment, but on the right of succession to possession or enjoyment which was generated not by the death of the grantor, but by the deed. The situation is exactly the same in the case at bar, except for one difference in favor of the appellant herein. Having held in *Coolidge v. Long* that the rights had vested in the beneficiaries under the deed of trust, the Court also held that the state could not impose the tax, because the rights of the beneficiaries to possession or enjoyment no longer depended on the state. Mr. Justice BUTLER said (p. 598):

> "The succession, when the time came, did not depend upon any permission or grant of the Commonwealth. While the sons if occasion should arise might by appropriate suit require the trustees to account, it is to be borne in mind that the property was never in the custody of the law or of any court. Resort might be had to the law to enforce the rights that had vested. But the Commonwealth was powerless to condition possession or enjoyment of what had been conveyed to them by the deeds."

Four members of the Court dissented from that view. Justice ROBERTS, delivering the dissenting opinion, said (p. 611):

> "But it is obvious that the children did rely on the law of Massachusetts for their right to receive the trust property from the trustees; and it might well have been they would have had to resort to her courts to obtain possession. All the law applicable to the administration of trusts, regulating the acts of trustees, giving remedies to trustees' defaults, providing for their compensation, and requiring the full execution of their fiduciary duties, was available to appellant. Without it their future interest, by way of remainder, might have been the merest shadow."

But there can be no disagreement on this point in the case at bar. Here the settlor transferred the property in New York to a New York Trust Company. Had the beneficiaries experienced, or should they experience any difficulty in the matter of obtaining their share of the property, their rights would depend not on the law of Connecticut, but on the law of New York. In other words, if the Massachusetts tax was inapplicable, then *a fortiori* the Connecticut tax must be held inapplicable.

IV.

The Question Presented Is Important. The Judgment Below Cannot Be Sustained Except By A Departure From Former Decisions. Justice To The Litigants And The Principles Of Certainty And Stability In The Law Require That Such Departure Be Supported By Cogent Reasons.

The question presented in this case is a very important one: *Can a gift inter vivos made through an irrevocable trust and not in contemplation of death be subjected to*

death duties? In view of the uniform rulings of this Court concerning the effect of transfers of property by irrevocable trusts, and especially in view of the statement in *Coolidge v. Long* (p. 598) that

> "Succession is effected as completely by a transfer of a life estate to one and remainder over to another as by a transfer in fee.",

it cannot be said that the question is unimportant, any more than that could be said of the question whether death duties may be imposed on a transfer in fee absolute made *inter vivos* and not in contemplation of death. It is true, the precise question has never been directly decided by this Court, but we believe we have demonstrated that the logical sequence of the cases which have been decided leads to the conclusion that such a tax cannot be sustained.

Although we maintain that the decision in this case rendered on January 9th is not compatible with *Coolidge v. Long* and the cases which preceded it, we realize that the doctrine of *stare decisis* does not compel this Court to adhere under all circumstances to its prior decisions. This Court may find it necessary, or desirable, or expedient to depart from the law as heretofore laid down, either by overruling its prior decisions, as was done in

Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204;
Baldwin v. Missouri, 281 U. S. 586;
Fox Film Corporation v. Doyal, 286 U. S. 123.

or by distinguishing the case at bar from the previous cases, as was done in

Educational Films Corp. v. Ward, 282 U. S. 379;
Pacific Co. Ltd. v. Johnson, 285 U. S. 480.

But the decisions of this Court are of great authority; their effect goes far beyond the controversy in the particular case; they are the source of certainty and stability in the law, especially on questions of constitutional law. Therefore, in the interest of certainty and stability, a departure from previous decisions should not be made, unless supported by cogent reasons. As Mr. Justice FIELD said in *National Bank of Gennessee vs. Whitney,* 103 U. S. 99, 102:

> "Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reason, certainly not because of subsequent doubts as to their soundness."

A departure from previous decisions should not be supported by a mere *dictum* which is in conflict with the reasons necessary to the decision of the same case. The *ratio decidendi* of *Coolidge v. Long* was that the retroactive statute was unconstitutionally applied, *because the death of the grantor was not the generating source of the transfer.* The *dictum,* as interpreted by the decision in the present case, was that a similar prospective tax would be valid, *because the event taxed was generated by the death of the decedent.* The conflict between the *dictum* and the *ratio decidendi* is evident. As between the two, the latter is of far greater authority. As was said by Mr. Justice VANDEVANTER in *Ex Parte Bakelite Corporation,* 279 U. S. 439, 455:

> "And any weight the dictum, as such, might have, is more than overcome by what has been said on the question in other cases, where there was need for considering it."

This is especially so where the *dictum* is in conflict with the *ratio decidendi* of the same case.

A departure from prior decisions should not be based on *any dictum*, even if not in direct conflict with the *ratio decidendi* of the same case or of other cases. This Court has often reiterated the proposition that a former *dictum* should not control the judgment in a suit in which the point is directly presented.

Harriman v. Northern Securities Co., 197 U. S. 244, 291;
Myers v. United States, 272 U. S. 52, 142;
Pacific Co. v. Peterson, 278 U. S. 130, 136.
Sterling v. Constantin, decided Dec. 12, 1932.

Most of the statements on this point go back to the principle laid down by Chief Justice MARSHALL in *Cohens v. Virginia*, 6 Wheat. 264, 399:

> "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with a case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided but their possible bearing on all other cases is seldom completely investigated."

Decisions on the basis of *dicta*, rather than on the reasons of prior decisions, will lead to much confusion and uncertainty in the law. The case of *Coolidge v. Long* is an excellent illustration of the confusion which would result from such judicial process.

Within the space of one month, this Court has upheld one *dictum* and overruled another *dictum* of *Coolidge v.*

Long. In the case at bar this Court upheld the *dictum* which, we have shown, is in conflict with the *ratio decidendi* of the case. In *Gwinn v. Commissioner of Internal Revenue* decided December 5, 1932, this Court overruled the *dictum* in *Coolidge v. Long* (p. 599), which limited the application of *Tyler v. United States,* 281 U. S. 497, to cases where "the estate was created after the passage of the applicable Act; and none of the property constituting it had prior to its creation ever belonged to the surviving spouse." Surely it cannot be said that, in deciding *Gwinn v. Commissioner of Internal Revenue,* it was entirely a matter of choice to hold that the transfer was taxable because the decedent had remained in control of the property until his death, or to hold that the transfer was not taxable because it was "the settled conviction of this Court", when deciding *Coolidge v. Long,* that such tax may be imposed only if the joint tenancies were created after the passage of the taxing statute.

Evidently not all the dicta can be regarded as expressive of the law. But *for future guidance,* which of them should and which should not be regarded as the law? That, after all, is the test for certainty and stability.

CONCLUSION.

In view of the fact that the case at bar is properly within the appellate jurisdiction of this Court, and that appellant had a reasonable right, relying on the former decisions of this Court, to assume that the source of the transfer in question was not the death of the decedent, but the deed of trust, we submit that the appellant never had an opportunity to demonstrate to this Court the truth of this premise, and appellant prays that it be af-

forded an opportunity to do so in a rehearing of this cause.

Respectfully submitted,

Dated: February, 1933.

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Of Counsel.

CERTIFICATE OF COUNSEL.

I, GREGORY HANKIN, of counsel for the above named appellant do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

GREGORY HANKIN.